



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 6, 2003

Mr. Mike Atkins
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823 Central
Odessa, Texas 79761

OR2003-1466

Dear Mr. Atkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177525.

The Ector County Independent School District (the "district"), which you represent, received a request for any records related to assaults of a district employee. You state that you have released a portion of the requested information to the requestor. However, you claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the requestor. See Gov't Code § 552.304 (providing for submission of public comments).

You assert that document nos. 1 through 36 of the submitted information are excepted from disclosure under section 552.101 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA].

FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless

otherwise authorized by the student. *See* 20 U.S.C. § 1232g(d). "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). A student's handwritten statement is generally considered "identifying information." *See* Open Records Decision No. 224 (1979).

After reviewing the information at issue, we conclude that document nos. 1 through 36 are records created by the district's police department for purposes of law enforcement. The district's police department records do not constitute "education records" for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); Open Records Decision No. 612 (1992) (term "education records" does not include records maintained by law-enforcement unit of educational agency or institution created by that law-enforcement unit for purpose of law enforcement). However, records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit are not records of a law enforcement unit. *See* 34 C.F.R. § 99.8(b)(2)(i). Therefore, if document nos. 1 through 36 are maintained by the district's police department, they are law-enforcement records. Consequently, no information contained in these law-enforcement records, including the student's identity, is excepted from public disclosure under FERPA.

However, if document nos. 1 through 36 are not maintained by the district's police department, we conclude that they are "education records" for purposes of FERPA. We note that FERPA specifically provides for the release of "education records" to "school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests." 20 U.S.C. § 1232g(b)(1)(A). Thus, it is for the district to decide whether the requestor, who represents a teacher, has a "legitimate educational interest" in the education records at issue. *See* 34 C.F.R. § 99.31(a)(1). Additionally, we note that the district is permitted but not required to disclose the education records to a requesting teacher who is seeking the records for a "legitimate educational interest." *See* 34 C.F.R. § 99.31(b). You state the district has determined that the release of document nos. 1 through 36 to the requestor would not serve a legitimate educational interest. Consequently, we agree that the district must withhold document nos. 1 through 36 in their entirety under FERPA and sections 552.026 and 552.101 of the Government Code if they are not maintained by the district's police department.¹

¹If you have questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education's Family Policy Compliance Office, whose address and telephone number follow:

In regard to the bracketed information on document no. 37, you raise section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You indicate that the information you have identified as section 552.107 information was communicated between the district and its attorney. Based on your representations and arguments and our review of this information, we find that you have demonstrated that the information you have marked on document no. 37 is protected by the attorney-client privilege and is therefore excepted from disclosure under section 552.107.

Additionally, you assert section 552.108 of the Government Code in regard to document nos. 38 through 40 of the submitted information. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You assert that document nos. 38 through 40 pertain to an investigation by the district's police department that concluded in a result other than conviction or deferred adjudication. Upon review of this information, we agree that section 552.108(a)(2) is applicable.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and arrest information, you may withhold document nos. 38 through 40 from disclosure based on section 552.108(a)(2). We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

Finally, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information made confidential by other statutes. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007 of the Family Code. However, section 58.007 is inapplicable here because we are unable to determine that the incident at issue involves a suspect or offender who is a "child" as defined by section 51.02 of the Family Code. A "child" is a person who is:

- (A) ten years of age or older and under 17 years of age; or
- (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Fam. Code § 51.02(1). Here, you have failed to establish that the individual identified as the offender in document nos. 41 and 42 was a juvenile at the time of the incident. Therefore, the district may not withhold document nos. 41 and 42 under section 58.007 of the Family Code.

In summary, we conclude that: 1) you must withhold document nos. 1 through 36 in their entirety under FERPA and sections 552.026 and 552.101 of the Government Code only if they are not maintained by the district's police department; 2) you may withhold the

bracketed information in document no. 37 under section 552.107 of the Government Code; and 3) with the exception of the basic front page offense and arrest information, you may withhold document nos. 38 through 40 based on section 552.108 of the Government Code. All remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

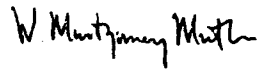
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 177525

Enc: Submitted documents

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